UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-80108-CR-ROSENBERG/REINHART

UNITED STATES OF AMERICA

v.

LAWRENCE WEISBERG,

Defendant.
_____/

UNITED STATES' RESPONSE TO DEFENDANT'S OBJECTIONS TO THE PRE-SENTENCE INVESTIGATION REPORT (DE34) AND SENTENCING MEMORANDUM (DE35)

The United States, by and through the undersigned Assistant United States Attorney, hereby files its Response to defendant Lawrence Weisberg's Objections to the Pre-Sentence Investigation Report ("PSI") (DE34), and to the Defendant's Sentencing Memorandum (DE35). As set forth below, the United States has no objection to the clarifications set forth in the defendant's PSI Objections. With regard to the defendant's Sentencing Memorandum, pursuant to the Plea Agreement, the parties have agreed to recommend a sentence at the low-end of the defendant's advisory guideline range unless the United States files a substantial assistance motion pursuant to U.S.S.G. § 5K1.1. As of today's date, the U.S. Attorney's Office has not reached a decision on whether to file that Motion. For the reasons set forth below, the United States opposes any request for a variance, or for any downward departure beyond any substantial assistance reduction that may be contained in a motion filed by the United States pursuant to U.S.S.G. § 5K1.1.

RESPONSE TO OBJECTIONS TO PRE-SENTENCE INVESTIGATION REPORT

Defendant Lawrence Weisberg has submitted written objections to the Pre-Sentence Investigation Report to the Court's Probation Office (DE34). These contain one correction from

a typographical error and three clarifications. All appear to be accurate.

RESPONSE TO SENTENCING MEMORANDUM

The defendant also has filed a Sentencing Memorandum (DE35), which asks the Court for a downward variance to a reasonable sentence pursuant to 18 U.S.C. § 3553(a). The Sentencing Memorandum has been filed apparently in anticipation of the government filing a motion for downward departure pursuant to U.S.S.G. § 5K1.1. Without the government filing such a motion, the plea agreement prohibits any requests for a downward variance because the parties agreed that the guideline recommendations contained in the plea agreement resulted in a reasonable sentence. As set forth in the plea agreement, "if the Court's Probation Office and the Court calculate the advisory guideline range as set forth above, that is, with a final Total Offense Level of 14, then the parties will jointly recommend that the Court impose a sentence at the low end of the advisory guideline range" (DE20 at ¶ 7(f)). The Court' Probation Office did, in fact, calculate the advisory guideline range with a Total Offense Level of 14 (PSI (DE26) at ¶ 74)). Accordingly, the parties are bound to recommend a sentence at the low end of that advisory guideline range, that is, 15 months' imprisonment (*see* PSI at ¶ 126).

The plea agreement does state that, if the U.S. Attorney's Office "files a motion for sentence reduction pursuant to USSG § 5K1.1 or Fed. R. Crim. P. 35 based upon the defendant's substantial assistance, then both parties are free to ask the Court to impose any reasonable sentence based upon an analysis of the factors contained in 18 U.S.C. § 3553(a)" (DE20 at ¶ 7(h)). As of today's date, no such motion has been filed.

With regard to the arguments for a sentencing variance, if the Court decides to consider them, and regardless of the U.S. Attorney's Office's decision regarding whether to file a 5K1.1 motion, the undersigned respectfully requests that the Court consider the following.

1. The Defendant's Pre-Plea Cooperation Was Already Taken Into Account By Virtue of His Plea Agreement.

Defendant Weisberg asks the Court to consider his "extraordinary cooperation and acceptance of responsibility" as a basis for a downward variance, citing to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. Both of those references allow the Court to impose a sentence outside the advisory guideline range in consideration of substantial assistance, upon the filing of a motion by the government. As noted above, as of today's date, the U.S. Attorney's Office has not filed such a motion.

The Court also should be aware that the defendant's pre-plea efforts at cooperation were already considered in a series of charging decisions and sentencing recommendations contained in the plea agreement. First, the plea agreement states that, in "consideration of the undertakings contained herein, this Office agrees that it will not pursue any additional charges under 18 U.S.C. §§ 1347 [health care fraud], 1349 [health care fraud conspiracy], 1956 [money laundering conspiracy], and 1957 [money laundering] related to the defendant's involvement in criminal activity in the Southern District of Florida that is known to this Office at the time the parties entered into this agreement" (DE20 at ¶ 2). The agreement to forego other charges, in favor of a single money laundering charge under 18 U.S.C. § 1957, greatly decreased the defendant's statutory sentencing exposure – in terms of imprisonment, fines, and forfeitures – as well as his exposure under the advisory guidelines. Second, the plea agreement contains a series of recommendations for calculation of the advisory guidelines that are limited not just to the defendant's individual acts of money laundering related to just one specific clinical laboratory, but further limited the laundering figure to amounts that the defendant kept for himself. Third, because of the agreement to charge a single substantive count of money laundering, rather than a conspiracy or numerous substantive charges for every act of money laundering, the defendant has only been required to

forfeit the proceeds of a single transaction rather than all of the monies he received. All of these concessions resulted in a significant benefit to the defendant. A number of other individuals involved in the case have been convicted. Applying the guidelines used for the owners of Smart Lab – the clinical lab where defendant Weisberg pretended to be a "sales rep" in order to launder the health care fraud proceeds – the defendant's advisory guideline range would likely have been 37-46 months' imprisonment, instead of the 15-21 month range that he currently faces.

These concessions were made in recognition of the fact that, once the defendant secured his current counsel,[1] he began cooperating in earnest, including collecting and organizing documents from his electronic records that demonstrated his own, and others', involvement in the health care fraud and money laundering scheme. The defendant appeared for several debriefings and answered questions thoroughly and truthfully. The defendant's contributions were significant, leading the government to include significant charging and sentencing concessions in the plea agreement in recognition of the defendant's substantial assistance. The parties agreed, in the plea agreement, that those concessions adequately and accurately recognized the defendant's pre-plea cooperation. For this reason, the plea agreement makes clear that a further sentence reduction would be warranted *only* if "the defendant's *post-plea* cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the Court's downward department from the advisory sentencing range" (DE20 at ¶ 9).

For these reasons, in the absence of the Office deciding to file a motion for downward departure pursuant to U.S.S.G. § 5K1.1 based upon post-plea substantial assistance, the United States respectfully submits that the defendant's assistance and acceptance of responsibility do not warrant a variance from the advisory guideline range.

[1] The defendant had been contacted by law enforcement and interviewed several months before he secured current counsel. Those interactions did not assist law enforcement.

2. The Defendant's Other Asserted Bases Do Not Warrant a Downward Variance, Especially When Considering the Other Factors in 18 U.S.C. § 3553(a).

Although prohibited by the Plea Agreement from asking the Court to consider a downward variance, defendant Weisberg asks the Court to consider his history and characteristics, likelihood of recidivating, and family responsibilities to warrant a reduced sentence. The United States respectfully submits that, when considering all of the 3553(a) factors, the low end of the advisory guideline range as currently calculated results in a reasonable sentence and should be imposed.

First, with regard to the history and characteristics of the defendant, Mr. Weisberg was an attorney who also ran a real estate brokerage and offered loan services. Defendant Weisberg did not participate in this offense because he had no other way of earning money; he was educated and already earned a substantial income. The government does not dispute Mr. Weisberg's community involvement as set forth in his Sentencing Memorandum, but submit that those are not sufficient to warrant a variance from the low-end of an already reduced guideline range.

Second, the facts and circumstances of the offense should be considered, especially in light of Mr. Weisberg's position as an attorney. The charged money laundering scheme involved Mr. Weisberg and his associates posing as "sales reps" for a clinical laboratory, Smart Lab, that was paying kickbacks to substance abuse treatment facilities for the referral of medically unnecessary laboratory testing that was billed to the patient's insurance. The cycle of kickbacks for unnecessary testing allowed unscrupulous treatment facilities to thrive at the expense of patients. Mr. Weisberg was used as a "go-between" for the laboratory and Lanny Fried, one of Mr. Weisberg's business associates. Mr. Fried was on federal supervised release and had to pay restitution; he also owed back taxes. To avoid these obligations, Mr. Fried would take loans from Mr. Weisberg and others, and then have Smart Lab "hire" the creditors and pay them a portion of the "salary" that was owed to Mr. Fried. This made it appear that Mr. Fried's salary was

significantly lower than it was, and helped him avoid tax liens and his restitution obligation. Given that Mr. Weisberg was a member of the Bar, his decision to involve himself with Mr. Fried and his scheme was more significant. These facts also relate to another sentencing factor, that is, the need for the sentence to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). In light of the offense, Mr. Weisberg's position as an attorney, and the large sum of money that he gained from the offense, a guideline sentence should be imposed.

The Court also must consider deterrence – both specific deterrence of the defendant and general deterrence to keep others from committing similar offenses. Mr. Weisberg probably is unlikely to re-offend, although the statistics cited by the defense are not really on-point (they relate primarily to violent crime and drug defendants, not white collar defendants). Nonetheless, the Eleventh Circuit has made clear that general deterrence is especially important in white collar offenses where defendants, like Mr. Weisberg, make significant profits from their offenses. In *United States v. Hayes*, 762 F.3d 1300 (11th Cir. 2014), the Court of Appeals rejected a probationary sentence – even though the government had filed a 5K1.1 substantial assistance motion because: "general deterrence is an important factor in white collar cases, where the motivation is greed . . . we have set aside sentences of little or no imprisonment because they do not constitute just punishment for the offense, do not promote respect for the law, and will not do much to deter similar criminal activity by others." *Id.* at 1308. The Court went on to say that the low sentence imposed conveys "the message "that would-be white-collar criminals stand to lose little more than a portion of their ill-gotten gains and practically none of their liberty," and accordingly do not constitute just punishment for Mr. Hayes' offenses or promote respect for the law. Second, the sentences do not provide for general deterrence because "[t]he threat of spending time on probation simply does not, and cannot, provide the same level of deterrence as can the

threat of incarceration in a federal penitentiary for a meaningful period of time." *Id.* at 1310-11.

In a health care fraud case, the Eleventh Circuit delved deeper into the background of the § 3553(a) factors, in particular the general deterrence factor, and wrote:

> the Congress that adopted the § 3553 sentencing factors emphasized the critical deterrent value of imprisoning serious white-collar criminals, even where those criminals might themselves be unlikely to commit another offense. We stated that because economic and fraud-based crimes are more rational, cool and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence. Our basis for this determination was that defendants in white collar crimes often calculate the financial gain and risk of loss, and white-collar crime therefore can be affected and reduced with serious punishment.

United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013) (internal quotations and brackets omitted).

The guidance from *Hayes* and *Kuhlman* applies to Mr. Weisberg – this was simply a crime of greed. The guidance also stresses the need to deter others in the community from committing similar crimes.

CONCLUSION

For the foregoing reasons, the United States respectfully recommends that the Court correct the PSI in accordance with the defendant's objections and deny the defendant's request for a downward variance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 15, 2018, I filed and served the foregoing document via CM/ECF.

s/*A. Marie Villafaña*
A. MARIE VILLAFAÑA
Assistant United States Attorney